A

Builtamont International Sdn Bhd v RHB Bank Bhd

B HIGH COURT (KUALA LUMPUR) — WRIT NO WA-22NCC-469–11 OF 2017
MOHD NAZLAN J
4 SEPTEMBER 2018

C *Civil Procedure — Striking out — Statement of claim — Whether plaintiff payee changed its position in good faith as result — Whether statement of claim obviously unsustainable — Whether plaintiff's originating summons ought to be summarily dismissed on grounds that it was frivolous and vexatious; and abuse of process of court — Whether summary judgment could be sought — Rules of Court* D *2012 O 18 r 19*

The first application was for a striking out of the claim of the plaintiff in encl 14, and the second application was a summary judgment application filed by the plaintiff against the defendant in encl 10. The plaintiff company E operated and maintained its bank account with the defendant, an approved bank, at the latter's BSC Centre Branch, Kuala Lumpur ('the branch'). On 5 September 2017 the plaintiff deposited four cheques for a total amount of RM4.5m drawn by one Chairul Anhar in favour of the plaintiff into the plaintiff's account at the branch. An inquiry done by the plaintiff on 8 F September 2017 on the internet banking transaction history of the plaintiff's account revealed that as at 5 September 2017 the sum of RM4.5m had indeed been credited into the plaintiff's account and as at 7 September 2017 the balance in the plaintiff's account did reflect the new inward transfer. On the same day of 8 September 2017, the plaintiff issued two cheques from the G plaintiff's account. One was to Wijaya Rimba Enterprise as payee for RM2m ('the Wijaya cheque'), and the other was for IB Capital Sdn Bhd for RM2.3m ('the IB Capital cheque'). However, on 11 September 2017, the plaintiff stated that it discovered from a printed statement of account of the plaintiff's account that the amount of RM4.5m previously credited into its account at the branch H had been reversed and the same amount was debited from the plaintiff's account. As a consequence, the respective sums of RM2m and RM2.3m which was said to have been previously credited into the accounts of Wijaya Rimba Enterprise and IB Capital Sdn Bhd had also been reversed. The plaintiff thus commenced the instant writ action against the defendant, seeking the I repayment of the RM4.5m by the defendant to the plaintiff or otherwise reinstate the credit of the same amount into the plaintiff's account. The plaintiff had also filed a summary judgment application under O 14 of the Rules of Court 2012 on its claim against the defendant. The defendant responded by filing a striking out application against the claim of the plaintiff.

Held, allowing the striking out application and striking out the summary judgment application:

(1) The crediting of the RM4.5m into the account of the plaintiff was contrary to the mandate given to the defendant. There were also no such actual funds being deposited in the account of the plaintiff in the absence of the mandate. The defendant was never in receipt of funds from the drawer (see para 30).

(2) Evidence showed that the plaintiff was in fact aware of the stopped cheque situation before the plaintiff drew on the Wijaya cheque and the IB Capital cheque. This totally ruled out reliance on the assertion of the plaintiff having changed its position in good faith based on representation made by the defendant. The plaintiff also failed to credibly rebut the evidence of Whatsapp conversations between the assistant manager of the defendant at the branch and the personnel of the plaintiff authorised to deal with matters concerning cheque payments. It showed quite unmistakably that if the plaintiff had not known by then from Chairul Anhar himself that he had instructed stop payment on the cheques for the RM4.5m, notice had certainly been given by the defendant to the plaintiff that payment on the cheques for the RM4.5m presented by the plaintiff had been stopped by the drawer. The plaintiff could hardly be said to have altered its position in good faith by the issuance of the Wijaya cheque and the IB Capital cheque when it already had knowledge that payment on the RM4.5m cheque drawn by Chairul Anhar had been stopped (see para 45–46, 51 & 54).

(3) There was no premise for the plaintiff to seek a summary judgment or any judgment on its claim which statement of claim had ceased to exist. The defendant had successfully established that the claim filed by the plaintiff to be obviously unsustainable under either of the grounds stipulated under O 18 r 19(1)(b) or (d) of the Rules of Court 2012. The writ action and statement of claim by the plaintiff in other words was frivolous and vexatious and otherwise an abuse of process (see paras 56 & 59).

[Bahasa Malaysia summary

Permohonan pertama adalah untuk membatalkan tuntutan plaintif dalam lampiran 14, dan permohonan kedua adalah permohonan penghakiman ringkas yang difailkan oleh plaintif terhadap defendan dalam lampiran 10. Syarikat plaintif mengendalikan dan mengekalkan akaun banknya dengan defendan, sebuah bank yang diluluskan, di cawangan Pusat BSC, Kuala Lumpur ('cawangan'). Pada 5 September 2017, plaintif telah mendepositkan empat cek untuk jumlah RM4.5 juta yang dikeluarkan oleh seorang Chairul Anhar memihak kepada plaintif ke dalam akaun plaintif di cawangan. Pertanyaan yang dilakukan oleh plaintif pada 8 September 2017 pada sejarah

transaksi perbankan internet akaun plaintif mendedahkan bahawa pada 5 September 2017 jumlah RM4.5 juta telah dikreditkan ke dalam akaun plaintif dan pada 7 September 2017 baki dalam akaun plaintif menunjukkan pemindahan kemasukan baru. Pada hari yang sama pada 8 September 2017, plaintif mengeluarkan dua cek dari akaun plaintif. Satu adalah untuk Wijaya Rimba Enterprise sebagai penerima bayaran RM2 juta ('cek Wijaya'), dan yang lain adalah untuk IB Capital Sdn Bhd untuk RM2.3 juta ('cek IB Capital'). Walau bagaimanapun, pada 11 September 2017, plaintif menyatakan bahawa ia telah mendapati dari penyata akaun bercetak akaun plaintif bahawa jumlah RM4.5 juta yang sebelum ini dikreditkan ke dalam akaunnya di cawangan telah dikembalikan dan jumlah yang sama telah didebitkan dari akaun plaintif. Akibatnya, jumlah wang sebanyak RM2 juta dan RM2.3 juta yang dikatakan sebelum ini dikreditkan ke dalam akaun Wijaya Rimba Enterprise dan IB Capital Sdn Bhd juga telah dikembalikan. Plaintif dengan itu memulakan tindakan writ ini terhadap defendan, memohon pembayaran balik RM4.5 juta oleh defendan kepada plaintif atau sebaliknya memulihkan kredit jumlah yang sama ke dalam akaun plaintif. Plaintif juga telah memfailkan permohonan penghakiman ringkas di bawah A 14 Kaedah-Kaedah Mahkamah 2012 atas tuntutannya terhadap defendan. Defendan membalas dengan memfailkan permohonan pembatalan terhadap tuntutan plaintif.

Diputuskan, membenarkan permohonan pembatalan dan membatalkan permohonan penghakiman ringkas:

(1) Pengkreditan RM4.5 juta ke dalam akaun plaintif adalah bertentangan dengan mandat yang diberikan kepada defendan. Tiada dana sebenar seperti yang didepositkan dalam akaun plaintif dengan ketiadaan mandat. Defendan tidak pernah menerima dana dari pembayar (lihat perenggan 30).

(2) Keterangan menunjukkan bahawa plaintif sebenarnya menyedari situasi perhentian cek sebelum plaintif mengeluarkan cek Wijaya dan cek IB Capital. Ini benar-benar menolak kebergantungan pada pernyataan plaintif yang telah mengubah kedudukannya kepada niat baik berdasarkan perwakilan yang dibuat oleh defendan. Plaintif juga gagal untuk secara kredibel menyangkal keterangan perbualan Whatsapp di antara penolong pengurus defendan di cawangan dan kakitangan plaintif yang diberi kuasa untuk menangani perkara-perkara mengenai pembayaran cek. Ia menunjukkan dengan jelas bahawa jika plaintif tidak mengetahui pada ketika itu dari Chairul Anhar sendiri bahawa dia telah mengarahkan perhentian pembayaran cek untuk RM4.5 juta, notis itu telah diberikan oleh defendan kepada plaintif bahawa pembayaran cek untuk RM4.5 juta yang dibentangkan oleh plaintif telah dihentikan oleh pembayar. Plaintif tidak boleh dikatakan telah mengubah kedudukannya dengan niat baik dengan pengeluaran cek Wijaya dan cek IB Capital apabila ia sudah mengetahui bahawa pembayaran atas cek RM4.5 juta

yang dikeluarkan oleh Chairul Anhar telah dihentikan (lihat perenggan 45–46, 51 & 54).

(3) Tiada premis bagi plaintif untuk mendapatkan penghakiman ringkas atau apa-apa penghakiman atas tuntutannya apabila penyataan tuntutan itu tidak lagi wujud. Defendan telah berjaya membuktikan bahawa tuntutan yang difailkan oleh plaintif adalah jelas tidak dapat dikekalkan di bawah mana-mana alasan yang ditetapkan di bawah A 18 k 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012. Tindakan writ dan penyataan tuntutan oleh plaintif dengan kata lain adalah remeh dan menyusahkan dan selain penyalahgunaan proses (lihat perenggan 56 & 59).]

Notes

For cases on statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9458–9521.

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd [1979] 3 All ER 522, QBD (refd)
Chua Neoh Kow v Malayan Banking Bhd [1986] 2 MLJ 396 (refd)
Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
London Joint Stock Bank v Macmillan and Arthur [1918] AC 777, HL (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520, CA (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)
Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors [2009] 6 MLJ 863, CA (refd)

Legislation referred to

Rules of Court 2012 O 14, O 18 r 19(1), (1)(b), (1)(d)

Jamie Wong (Shugan Raman and Kelvesh with him) (Jamie Wong) for the plaintiff.
Sean Yeow Huang-Meng (Aric Wong with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This judgment involves two applications arising from a writ action filed by the plaintiff, claiming a sum of RM4.5m which it alleged had been wrongly debited by the defendant bank from the plaintiff's bank account with the defendant.

[2] The first application is for a striking out of the claim of the plaintiff in encl 14, and the second is a summary judgment application filed by the plaintiff against the defendant in encl 10.

[3] These were heard together, at the conclusion of which I allowed the striking out application and highlighted the primary reasons for the same. The summary application as a result became academic. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[4] The facts giving rise to the claim are fairly straight forward. The plaintiff company operated and maintained its bank account with the defendant, an approved bank, at the latter's BSC Centre Branch, Kuala Lumpur ('the branch').

[5] It is not in dispute that on 5 September 2017 the plaintiff deposited four cheques for a total amount of RM4.5m drawn by one Chairul Anhar in favour of the plaintiff into the plaintiff's account at the branch.

[6] A inquiry done by the plaintiff on 8 September 2017 on the internet banking transaction history of the plaintiff's account revealed that firstly, as at 5 September 2017, as stated earlier, the sum of RM4.5m had indeed been credited into the plaintiff's account; and that secondly, as at 7 September 2017 the balance in the plaintiff's account did reflect the new inward transfer, and thus recorded a total of RM4,507,276.59 in the plaintiff's account.

[7] On the same day of 8 September 2017, the plaintiff issued two cheques from the plaintiff's account. One was to Wijaya Rimba Enterprise as payee for RM2m ('the Wijaya cheque'), and the other was for IB Capital Sdn Bhd for RM2.3m ('the IB Capital cheque').

[8] On the same day of 8 September 2017, the Wijaya cheque and the IB Capital cheque were issued to the respective payees, they were presented for crediting as evidenced by the respective cheque deposit slips.

[9] However, on 11 September 2017, the plaintiff stated that it discovered from a printed statement of account of the plaintiff's account that the amount of RM4.5m previously credited into its account at the branch has been reversed and the same amount was debited from the plaintiff's account.

[10] As a consequence, the respective sums of RM2m and RM2.3m which was said to have been previously credited into the accounts of Wijaya Rimba Enterprise and IB Capital Sdn Bhd had also been reversed.

[11] Both Wijaya Rimba Enterprise and IB Capital Sdn Bhd have since initiated legal actions by way of originating summons against the plaintiff and the defendant herein.

[12] The plaintiff has now also commenced the instant writ action against the defendant, seeking the repayment of the RM4.5m by the defendant to the plaintiff or otherwise reinstate the credit of the same amount into the plaintiff's account.

[13] The plaintiff has also filed a summary judgment application under O 14 of the Rules of Court 2012 on its claim against the defendant. The defendant responded by filing a striking out application against the claim of the plaintiff. Hence the proceedings now before me.

[14] Although I heard the arguments for both applications together, the issues were the same. When both summary judgment and striking out applications are before the court, I think it makes better judicial sense to examine the issues in the context of the striking out application first, since should the application be granted and the statement of claim is struck out, there is as a result no claim in respect of which a summary judgment application can be premised on.

ESSENCE OF CONTENTIONS OF PARTIES

[15] The thrust of the plaintiff's claim in the writ action is that the defendant had represented that the said sum of RM4.5m had been credited into the plaintiff's account upon the plaintiff depositing the cheque of RM4.5m at the branch.

[16] The plaintiff asserted that the defendant had never at any material point in time notify the plaintiff of the reversal or the reasons for the same, until the plaintiff's own discovery of the reversal on 11 September 2017. The defendant had thus unilaterally altered the plaintiff's account with the prior consent of the plaintiff.

[17] On the other hand, the defendant, in advancing its striking out application maintains that, Chairul Anhar, the drawer of the cheques for the aggregate sum of RM4.5m had earlier on 3 July 2017 notified the defendant to stop payment on the said cheques, well before the plaintiff deposited the same at the branch on 5 September 2017. The crediting which occurred in favour of the plaintiff's account was therefore without mandate, which entitled the defendant to its recovery.

[18] This is especially since there are also express contractual terms with its account holders like the plaintiff which permit the defendant to debit sums from accounts wrongly credited. There is therefore no basis for the plaintiff to claim from the defendant. The claim is according to the defendant is obviously unsustainable and ought to be struck out.

THE LAW ON STRIKING OUT — A SUMMARY

[19] The starting point of reference must be O 18 r 19(1) of the Rules of Court 2012 ('the RC 2012') which reads as follows:

> 19 Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[20] The defendant relies on limbs (b) and (d) of O 18 r 19(1) in support of its striking out application, in that the claim filed by the plaintiff is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the court.

[21] The leading authority on O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, and in particular, the following part of the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91), and this

summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[22] It is therefore well established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable (see also the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520). It is also only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

[23] It could also be said that as for limb (b), the test is the same consideration on the claim being obviously unsustainable and that for limb (d), it arises when the process of the court is not used in a bona fide manner and has been abused (see the Court of Appeal decision in *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192) and the said claim must also be proven to be obviously unsustainable (see another Court of Appeal decision of *Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863).

[24] It is equally clear as it is practical that the situations that could fall within the categories under limb (d) are never closed given the variety of circumstances arising from the facts of each particular case. The categories of cases where the process of the court could be abused are varied as they are numerous. They are non-exhaustive (see *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637).

[25] And, as established by the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, the courts have the inherent jurisdiction to prevent an abuse of its process.

[26] The court is permitted, in an application other than under limb (a) (on the ground of no reasonable cause of action) to examine the affidavit evidence instead of merely the pleadings in the statement of claim of the plaintiff (see *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ

309), and where necessary scrutinise them with a fine tooth comb (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1).

EVALUATION AND FINDINGS OF THIS COURT

[27] It is settled law that cheques properly drawn by the signatory of the account must be honoured, so long as there are sufficient funds in the account. The House of Lords in *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 held as follows:

> The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the account according to the tenor of the cheque.

[28] And it is no less well-established that a banker's authority to pay a cheque may be terminated by countermand of payment. Thus, in *Chua Neoh Kow v Malayan Banking Bhd* [1986] 2 MLJ 396, in the judgment of Shankar J (as he then was), the bank was held liable because it honoured a cheque despite an oral countermand and a letter to stop payment furnished by its customer.

[29] In the instant case, the defendant has exhibited a duly completed stop payment instruction form from the drawer of the four cheques, Chairul Anhar, dated 3 July 2017. This was prior even to the time when the plaintiff banked in those same cheques into the plaintiff's account at the branch two months later on 5 September 2017.

[30] As such the crediting of the RM4.5m into the account of the plaintiff was contrary to the mandate given to the defendant. And it is also clear at the same time that there was no such actual funds being deposited in the account of the plaintiff in the absence of the mandate. The defendant was never in receipt of funds from the drawer.

CONTRACTUAL TERMS AUTHORISING DEBITING OF ACCOUNT

[31] The crediting effected by the defendant was therefore a mistake. In this regard, the defendant has also exhibited in its affidavit, the account opening form duly executed by the authorised signatories of the plaintiff and accepted by the defendant which expressly included the term usually found in the standard terms and conditions governing bank account operation, in this case in cl 1(c) where it is stated that the plaintiff as the customer authorised the defendant as the bank in the following terms:

> Agree that you may debit my/our account and return funds that were wrongly credited

[32] This is in accord with common sense and logic. A customer cannot expect to receive funds via cheque payment from a person who decides not to proceed with payment, and then blame the bank as the intermediary by insisting the latter to make payment instead when the bank itself has not received any from the putative payer or drawer of the cheque.

[33] I agree the position in law may not be absolutely plain when there is a mistake. There may well be limited circumstances where banks cannot rely on their mistakes to avoid liability.

[34] The plaintiff in this case makes reference to the English case of *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1979] 3 All ER 522, a leading decision of the High Court concerning the recovery of a payment mistakenly made by a bank after the customer had countermanded the cheque, and relies on the following passage on the summary of the law on the point from the judgment of Robert Goff J (later Lord Goff of Chieveley) as supporting its contention:

> (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge and does discharge a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith or is deemed in law to have done so.

[35] In that case, the customer had instructed a stop on the relevant cheque, but due to an error on the part of the bank, payment was made to the payee. The bank rightly did not debit the account of the customer, and initiated proceedings to recover payment from the payee.

[36] It was held by the High Court in *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* that payment without mandate meant that the bank has paid out its own funds for it cannot debit the customer's account which had countermanded payment of the cheque.

[37] There can thus be no recovery if the payment was in any event within the customer's mandate in the sense that the mistake relates to some other matters, because such a payment would constitute a discharge of the customer's debt to the payee. This is not the situation in the case before me.

A WHETHER THE PLAINTIFF PAYEE CHANGED ITS POSITION IN GOOD FAITH AS A RESULT

[38] Neither can there be a recovery if the payee can be shown to have changed its position in good faith in reliance of the payment that was without mandate. This is the defence of change of position enunciated in the case of *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd*

[39] In *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* itself the High Court found that there was no mandate for payment, the payee gave no consideration to the bank for payment and there was also no evidence of any change of position on the part of the payee. The payee was directed to make the refund to the bank.

[40] The plaintiff argued that recovery by the defendant should not be allowed since the cheques for RM4.5m were to discharge a portion of the debt owed by the drawer customer to the plaintiff customer. In addition the plaintiff sought to augment its position by contending that based on the representations by the defendant, the plaintiff issued the Wijaya cheque and IB Capital cheque, causing a change in the position of the plaintiff in good faith.

[41] I do not think *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* assists the stance of the plaintiff. I say so for several reasons.

[42] First, in the instant case, it is not the defendant bank which seeks a repayment of funds made without mandate to the payee. Instead the debiting had been effected to reverse the mistake. The plaintiff is the party which claims the payment from the defendant bank.

[43] Secondly, its argument that the payment was to discharge the debt owed by Chairul Anhar to the plaintiff is not entirely accurate. This is because the plaintiff had even before the filing of the instant proceedings against the defendant, initiated in September 2017 a writ action in KL High Court Suit No WA-22NCVC-498–09 of 2017 against Chairul Anhar for the payment of RM36m, which included the RM4.5m specified in the cheques favouring the plaintiff, which is the subject of the instant proceedings.

[44] Significantly, the court granted summary judgment for the plaintiff's claim against Chairul Anhar on 16 April 2018. Thus the plaintiff has already by the time of the hearing of the applications before me a judgment debt against the customer or drawer of the cheque for the RM4.5m. This raises question as to the necessity for the plaintiff seeking another court order in this instant application before me to the same effect, potentially promoting double recovery.

[45] Thirdly, and in my view, most crucially, the case of the plaintiff, on the facts of this application, simply cannot succeed because evidence shows that the plaintiff *was in fact aware* of the stopped cheque situation before the plaintiff drew on the Wijaya cheque and the IB Capital cheque. This totally ruled out reliance on the assertion of the plaintiff having changed its position in good faith based on representation made by the defendant.

[46] The plaintiff failed to credibly rebut the evidence of Whatsapp conversations which took place between 11.10am on 8 September 2017 and 8.58am on 11 September 2017 between one Ms Tan Lay Yong, one of the two authorised personnel of the plaintiff for purposes of remittance applications, purchase of cheques, encash cheques, check bank balances and confirm cheques, and one Puan Nor Hawati Abdul Kadir, the assistant manager of the branch.

[47] At 11.10am Ms Tan wrote to Puan Nor Hawati as follows:

> Pn Hawa, tolong semak on the 5th we bank in rm4,500,000 to acc 21427700055305 builtamont international clear or not. Urgent pls.

[48] At 11.12am and 11.13am Puan Nor Hawati replied in the following terms:

> I think is return. Payment stopped. Ms Tan sebelum Bank u ada call the drawer ke.

[49] Then at 13.24pm, Ms Tan simply stated in response:

> Pls write to us.

[50] There was no other conversation from that last message until 8.58am on 11 September 2017 from Ms Tan informing Puan Nor Hawati that she was going to the branch to collect the plaintiff's September 2017 statement and requesting Puan Nor Hawati to get one of her officers to print out the statement for that purpose.

[51] In my view, the above conversations between the assistant manager of the defendant at the Branch and the personnel of the plaintiff authorised to deal with matters concerning cheque payments show quite unmistakably that if the plaintiff had not known by then from Chairul Anhar himself that he had instructed stop payment on the cheques for the RM4.5m, notice had certainly been given by the defendant to the plaintiff at around 11.12am on 8 September 2017 that payment on the cheques for the RM4.5m presented by the plaintiff had been stopped by the drawer.

[52] It will be recalled that the plaintiff did an account inquiry on 8 September 2017 which suggested the RM4.5m had been credited into the plaintiff's account; and that on the same day of 8 September 2017, the plaintiff issued the Wijaya cheque and the IB Capital cheque.

[53] But based on the plaintiff's own affidavit, these two cheques were only presented at the branch soon after noon on the same day of 8 September 2017. Thus the plaintiff could have chosen, following the update by the assistant manager of the defendant late morning via whatsapp conversation that same day, not to write those cheques or to prevent them from being presented.

[54] However, the plaintiff omitted to do so for reasons best known to the plaintiff. Thus, the plaintiff can hardly be said to have altered its position in good faith by the issuance of the Wijaya cheque and the IB Capital cheque when it already had knowledge that payment on the RM4.5m cheque drawn by Chairul Anhar had been stopped.

[55] In the upshot, clearly the claim by the plaintiff against the defendant is obviously and conspicuously unsustainable. There is absolutely no basis for the plaintiff making the claim. The claim, if allowed to progress, would be frivolous and vexatious and otherwise an abuse of the process of the court under Or 18 r 19(1)(b) and (d) and under the inherent jurisdiction of the court.

SUMMARY JUDGMENT APPLICATION BY THE PLAINTIFF

[56] In view of my decision to strike out the statement of claim of the plaintiff, there is no premise for the plaintiff to seek a summary judgment or any judgment on its claim which statement of claim has ceased to exist.

[57] In any event, even if I did not strike out the statement of claim, given the same issues raised by the parties in the summary judgment application, I would have readily determined that the reasons for my striking out the statement of claim of the plaintiff also constituted triable issues and reasonable defence which would have denied the appropriateness of a summary judgment be entered for the plaintiff against the defendant.

[58] In other words, I would have refused the summary judgment application. But it is now academic given the striking out of the writ and the statement of claim.

CONCLUSION

[59] In view of the foregoing myriad of reasons vis a vis the fact that payment for the RM4.5m had been stopped prior to presentation of the cheques for the RM4.5m, what more the subsequently drawn Wijaya cheque and the IB Capital cheque, including in particular concerning the existence of contractual terms authorising account debiting by the defendant bank in the event of a mistake, and more so the knowledge in respect of the stopped cheque attributed to the plaintiff, it is my judgment that the defendant has successfully established that the claim filed by the plaintiff to be obviously unsustainable under either of the grounds stipulated under O 18 r 19(1)(b) or (d) of the Rules of Court 2012. The writ action and statement of claim by the plaintiff in other words is frivolous and vexatious and otherwise an abuse of process.

[60] Accordingly, I allow encl 14 and strike out the statement of claim of the plaintiff, with costs.

[61] This, as a consequence, renders the summary judgment application (which in any event raises triable issues) totally academic. It is therefore struck out with no order as to costs.

Striking out application allowed and summary judgment application struck out.

Reported by Nabilah Syahida Abdullah Salleh